IN THE

Supreme Court of the United States

October Term, 1957

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, Deceased, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Delaware.

Reply Brief for the Petitioners.

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v.

ELIZABETH DONNER HANSON, as Executrix and Trustee Under the Last Will of Dora Browning Donner, Deceased,

WILMINGTON TRUST COMPANY, a Delaware Corporation, as Trustee Under Three Separate Agreements, (1) and (2) With William H. Donner Dated March 18, 1932 and March 19, 1932, and (3) With Dora Browning Donner Dated March 25, 1935,

DELAWARE TRUST COMPANY, a Delaware Corporation, as Trustee Under Three Separate Agreements, (1) With William H. Donner Dated August 6, 1940, and (2) and (3) With Elizabeth Donner Hanson, Both Dated November 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, JR., ESQUIRE, Guardian ad Litem for Dorothy B. R. Stewart and William Donner Denckla,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad Litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,

BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS,

LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as Trustee for Benedict H. Hanson, and as Trustee Under Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

REPLY BRIEF FOR THE PETITIONERS.

I. The Nonresident, Non-Appearing Defendants in the Florida Litigation, Who Were Served by Constructive Process and Given an Opportunity to Appear and be Heard, Were and Are Bound by the Florida Judgment Under the Doctrine Announced in McGee v. International Life Ins. Co.

Our main brief was written and filed before this Court rendered its opinion in *McGee v. International Life Ins. Co.* (December 16, 1957) 355 U. S. , 2 L. ed. 2d 223. In our main brief we groped for the doctrine announced in *McGee* and urged the application of such a doctrine on page 19.

The briefs filed by the various respondents were written and filed after *McGee* but they all rely on pre-*McGee* cliches. The respondents urge this Court to conclude that the nonresident defendants who were served by constructive process in the Florida proceedings, but did not appear, are not bound by the Florida judgment even though they were given an opportunity to appear and be heard. This contention is based on the fact that the nonresident defendants were not served personally in Florida, which respondents say prevents the Florida Court from entering an *in personam* judgment; and also because the securities held initially by Wilmington Trust Company under the so-called trust and now by Delaware Trust Company were never physically in Florida to enable the Florida Court to render an *in rem* judgment.

We submit that respondents' position is based on outmoded concepts of jurisdiction and due process. *McGee* recognizes jurisdiction over nonresidents through constructive service where they are given an opportunity to appear and be heard in certain situations where due process is accorded. For the convenience of the Court we set forth the following from the *McGee* Opinion:

"Since Pennoyer v. Neff, 95 US 714, 24 L ed 565, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent', 'doing business', and 'presence' as the standard for measuring the extent of state judicial power over such corporations. See Henderson, The Position of Foreign Corporations in American Constitutional Law, ch. V. More recently in International Shoe Co. v. Washington, 326 US 310, 90 L ed 95, 66 S Ct 154, 161 ALR 1057, the Court decided that 'due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " Id. 326 US at 316.

"Looking back over this long history of litigation a trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

Paraphrasing the paragraph which follows in the *McGee* Opinion, we say: Turning to this case we think it apparent that the Due Process Clause did not preclude the Florida Court from entering a judgment binding on the respondents and the non-appearing, nonresident Florida defendants who were served by constructive service and were given an opportunity to appear and be heard.

Let us examine the facts in the instant case which show that the Florida defendants had more than minimum contacts with Florida and that the maintenance of the Florida suit did not offend traditional notions of fair play and substantial justice.

The Florida Court was called upon to pass upon the validity of the so-called trust agreement between Mrs. Donner and Wilmington Trust Company and the purported exercises by her of powers of appointment thereunder. The Florida Courts concluded that the so-called trust agreement had been nothing more than an agency agreement. We thus have a situation insofar as Wilmington Trust Company is concerned whereby it, under the Florida rulings, was an agent of Mrs. Donner and as such held certain of her assets, which at the time of her death had a value of $1,493,629.91 (A104).[1] This trust agreement, whether called an agency agreement or a trust agreement, reserved to her broad powers. Under either the agency or trust concept she was the beneficial owner of the securities held by Wilmington Trust Company. The agreement provided (A21-29):

(a) That the trustee should pay over the net income to her for life.

(b) That she could appoint and change, from time to time, beneficiaries to take upon her death.

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1. References to the Transcript of Record will be (A —). References to the transcript of record on the appeal from the Florida Supreme Court, No. 107, will be (F. R. —). Said transcript of record has been supplemented by a stipulation to show that the complaint in the Florida case was mailed to nonresident defendants.

(c) That the principal functions to a trustee could only be exercised with the written consent of an advisor and she reserved the right to change the advisor from time to time.

(d) That she could amend, alter or revoke the agreement in whole or in part at any time or times, including the right to withdraw, in whole or in part, the securities held by the trustee.

(e) That she could, from time to time, remove and change the trustee.

These reserved powers were exercised by her from time to time. She withdrew part of the securities at one time (A103-104). She removed advisors from time to time (A25, 96, 97, 98). She designated different beneficiaries from time to time (A30-46). She was always in a position to remove the trustee and appoint another trustee or to amend or revoke the entire agreement (A21-29).

As Wilmington Trust Company was her agent under the Florida decisions, and under her control through her advisor certainly Wilmington Trust Company had contacts with Florida during the period she was a resident of Florida from 1944 until her death in 1952 (A74, 208; 3). Wilmington Trust Company was obligated to act as she directed and to turn over the let income. The powers of appointment exercised in 1949 and 1950, (A30-34, 35-37) were exercised by her while she was a Florida resident and were delivered to Wilmington Trust Company. Wilmington Trust Company was also named in her will in connection with the direction to the executrix to pay the estate taxes on the trust assets (A15).

Delaware Trust Company was a beneficiary under her will and also under the power of appointment of 1949 (A3, 14-20, 30-34). It was paid $400,000.00 by Wilmington Trust Company purportedly under the 1949 power of appointment and it is holding that amount in two trusts.

The beneficiaries of the trusts under which Delaware Trust Company is trustee are all residents of Florida and were all named defendants or were represented in the Florida litigation and appeared or were served through constructive process. It is difficult to see how Delaware Trust Company could say that it did not have contacts with Florida when the litigation started because the funds in question were held by it for Florida residents with the obligation to turn over to them the net income as Wilmington Trust Company previously had done (A254-261, 262, 269). Both trust companies have been recipients of fees under the terms of the trust agreements for their services in collecting the income for the Florida beneficiaries. This certainly makes economic contacts with Florida.

The foregoing, we submit, shows more than adequate minimum contacts with Florida and certainly it would not have offended traditional notions of fair play and substantial justice for Wilmington Trust Company and Delaware Trust Company to go to Florida to defend the trusts. In the briefs filed by respondents, they take the position that Wilmington Trust Company and Delaware Trust Company were indispensable parties to the Florida suit and that they owed a duty to defend the trusts. If so, they were derelict in their duty as they should have appeared in Florida to defend the trusts when the validity thereof was challenged. No hardship would have been imposed upon them to do so as the trusts all provide that their expenses are to be paid out of the funds and certainly expenses incurred in Florida to defend the trusts would have come within that category (A21, 255, 262). Furthermore, Mrs. Donner's trust provided in paragraph 12 that Wilmington Trust Company, in addition to its stated compensation, "shall also be entitled to receive a reasonable compensation for any extraordinary services performed by it hereunder" (A27). When the Florida litigation was started, these two corporate trustees had no way of knowing (unless they were in conspiracy with *some* of their benefici-

aries) that litigation would be started in Delaware to test the validity of the trusts and so, why didn't they defend the trusts in Florida where the beneficiaries were?

The other nonresident, non-appearing parties were likewise beneficiaries under instruments executed by a Florida resident and certainly cannot be heard to say that when the question of the validity of their gifts from a Florida decedent was challenged in a Florida Court that there was no duty on them to defend their gifts. Their contacts with Florida were as donees of a Florida domiciliary.[2]

II. The Florida Judgment Is Binding on Curtin Winsor, Jr., Who Was and Is a Remote, Contingent Beneficiary.

Much ado about Curtin Winsor, Jr., is made in the brief filed by respondent, Edwin D. Steel, Jr., guardian ad litem, etc., because Curtin Winsor, Jr., one of his wards, was not named in the Florida proceedings. Under the powers of appointment which were stricken down by the Florida Court $200,000.00 went into each of two trusts. One was for the benefit of Curtin's brother, Joseph Donner, and one was for the benefit of his brother, Donner Hanson, the life beneficiaries. These trusts provide that

2. All of the nonresident, non-appearing defendants were duly served through constructive service. In Mr. Steel's brief, page 14, he stated no attempt had been made to serve Hamilton, but has since withdrawn said statement. Hamilton was named as a defendant and the complaint stated he was a Florida resident. It was later found that he was not a Florida resident and proceedings were then had to serve him by constructive service. This was done separately from the service on the other nonresidents, but is not shown in the Florida Record on Appeal giving rise to Mr. Steel's erroneous belief. We have lodged with the Clerk certified copies of the various documents used in the Florida trial Court showing constructive service of process on Hamilton. Both the Florida Record and this record do show that decrees pro confesso were entered in the Florida proceedings against *"all"* of the nonresident, non-appearing defendants (F. R. ~~172~~ 95; A. ~~95~~ 172). This Court must assume that the decrees pro confesso were entered by the Florida Court only after due and proper service of process on said defendants, including Hamilton.

if these life beneficiaries die leaving issue or die having exercised powers of appointment, the issue or the appointees become the remaindermen. Only in the event one or both of Curtin's brothers should die without issue and without having exercised a power of appointment, would he acquire an interest in any part of such estates (A254-261, 262-269). As Curtin was merely a remote, contingent beneficiary and as his two brothers were parties to the Florida litigation, the fact that he was not named is immaterial and the Florida judgment is binding on him as he was and still is in privity wth them.

The general principles applicable to this situation which show that a contingent beneficiary such as Curtin need not be named to be bound by a judgment have been stated by this Court. In *Bigelow v. Old Dominion Copper Min. & Smelting Co.*, 225 U. S. 111, 56 L. ed. 1008, this Court said:

> "But a judgment not only estops those who are actually parties, but also such persons as were represented by those who were or claim under or in privity with them.
>
> "What is privity? As used when dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property. Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210. The ground upon which privies are bound by a judgment, says Prof. Greenleaf, in his work upon Evidence, 13th ed. vol. 1, § 523, 'is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.'"

30 Am. Jur. Judgments, § 222 and § 225 (now 30A Am. Jur. Judgments, § 396 and § 399) state the rule as follows:

"§ 222. Parties and Privies.—With regard to the persons in whose favor or against whom the doctrine of res judicata is applicable, the rule is well settled that a judgment is binding upon all parties to the proceedings in which it is rendered, and their privies. In the strict sense of the term, parties to a judgment in the eye of the law are those only who are named as such in the record, and are properly served with process, or enter their appearance, but the term 'parties,' within the contemplation of the rule of res judicata, is sometimes extended beyond the mere nominal parties to the record."

* * *

"§ 225. Persons Included as Privies.—There is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of res judicata. Who are privates requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title. Under this rule, privity denotes mutual or successive relationship to the same right of property, and there is privity within the meaning of the doctrine of res judicata where there is an identity of interest and privity in estate, so that a judgment is binding as to a subsequent grantee, transferee, or lienor of property. This is in harmony with the view that a judgment is binding on privies because they are identified in interest, by their mutual or successive relationship to the same rights of property

which were involved in the original litigation. There are also cases in which it is held that the requisite privity may result from representation, from blood relationship, or from law."

A case squarely in point is that of *Longworth v. Duff*, (Sup. Ct. Ill., 1921) 297 Ill. 479, 130 N. E. 690, where contingent remaindermen had not been named in proceedings involving title to land. The Court said:

"It is a general rule that the interest of the parties not before the court in a proceeding in equity will not be bound by the decree. * * * This general rule applies to all judicial proceedings, but an exception to it is recognized in cases where a party, though not before the court in person, is so far represented by others that his interest receives actual and efficient protection. * * *

"In the present case 25 of the descendants of the devisees mentioned in the will as contingent remaindermen in case of the death of Park Longworth without descendants surviving him were in being who were not made partes to the bill, and in this respect the case differs from that of Hale v. Hale, supra. The doctrine of representation, however, is not limited to cases of persons not in being. It was said in Faulkner v. Davis, 18 Grat. (Va.) 651, 98 Am. Dec. 698, also quoted in Hale v. Hale, supra:

"'This rule of representation often applies to living persons, who are allowed to be made parties by representation for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives, both of self-interest and affection, to make such defense, and *it is therefore considered unnecessary to make such living persons parties, and, indeed,*

improper to do so, and thus compel them to litigate about an interest which may never vest in them.'" (Emphasis supplied.)

Applying the test of mutuality to this situation, as this Court did in Bigelow, it becomes obvious that Curtin is bound by the Florida judgment. If the Florida Court had decided the issues the other way and had sustained Mrs. Donner's trust and powers of appointment, and then one of Curtin's brothers had died without issue and without having exercised a power of appointment, causing Curtin's contingent interest to become vested, he would have been and now would be in position to urge that the Florida judgment inured to his benefit as a successor in interest to his dead brother and that such judgment could be asserted by him as *res judicata* in any challenge by anyone of his rights. See *Restatement of the Law of Judgments*, § 89 and *Guayaquil & Quito Railway Co. v. Swydam Holding Corp.*, (Sup. Ct. Del., 1957) Terry , 132 A.2d 60.

III. Conclusion.

The action of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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